IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1052 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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STATE OF GUJARAT

Versus

MANSANGBHAI KALABHAI

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Appearance:

1. Criminal Appeal No. 1052 of 1985
MR MA BUKHARI, ld.APP for appellant
MR MJ BUDDHBHATTI for Respondents

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CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE K.M.MEHTA

Date of decision: 05/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

The State of Gujarat has filed this appeal challenging the judgment and order dated 31st May 1985 passed by the learned Extra Addl.Sessions Judge, Bharuch, in Sessions Case No.34 of 1985, acquitting the respondents-accused for the offences punishable under Sections 302 read with 34 of the Indian Penal Code.

2. The prosecution case, in brief, can be stated as under:

Accused No.1 is the brother and Accused Nos.2 and 3 are the nephews of deceased Somabhai Kalabhai. As per the case of the prosecution, the incident had taken place on 6.11.1984 at 10.00 a.m. in village Samoj of Jambusar Taluka, in which the accused caused injuries to the deceased by Dharia, Tabbal and Spear, on account of enmity in connection with a previous murder case and land dispute with the deceased. The incident was witnessed by the informant, Ravjibhai, PW3-Exh.13 and Shivabhai, PW4-Exh.15, the sons of the deceased. The informant thereafter went to Police Patel Amarsing and informed him about the incident. Both of them thereafter went to Vedach Police Station and lodged the complaint. The police thereafter started the usual investigation and submitted the chargesheet before the learned Judicial Magistrate, First Class, Jambusar, who, in turn, committed the case to the Court of Sessions, Bharuch, for trial.

The Charge at Exh.1 was framed against the accused for the offences under Section 302 read with Section 34 of the Indian Penal Code. The accused pleaded not guilty to the same and claimed to be tried. The learned trial Judge, after appreciating the evidence on record, including the further statement accused, recorded under Section 313 of the Code of Criminal Procedure, held that the prosecution, in the instant case, has failed to establish the charge against the accused beyond reasonable doubt. He, therefore, acquitted all the accused. Hence the present appeal.

3. Dr.Narendra Joshi, Exh.7, Medical Officer of Jambusar Hospital who has performed the post mortem of the deceased found as many as 21 external injuries. As can be seen from the post mortem report, most of the injuries are of incise wounds. However, on the head, there is one puncture wound on the front of the neck which is injury No.13 while there are some injuries which

are CLWs. According to Dr.Joshi, out of the 21 external injuries, injury Nos.1, 5, 6 and 12 are individually sufficient to cause death in ordinary course of nature. He has further stated that injury Nos.2, 3 and 4 are also individually sufficient to cause death, if they are internally affected in ordinary course of nature. According to Dr.Joshi, out of these injuries, injury Nos.1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 15, 17, 18 and 19 are possible by sharp cutting instruments which are possible by muddamal article Nos.3 and 4 - Dharia and Tabbal while injury No.13 can be possible by muddamal article No.5, i.e. spear. Injury Nos.4, 10, 14, 16, 20 and 21 are possible by hard and blunt substance. It is possible that the blunt portion of Article Nos. 3 and 4 can cause such injuries. Dr.Joshi has opined regarding the cause of death as shock due to haemorrhage due to cut of carotid arteries on both sides and internal injury on skull and extradural and subdural haemorrhage.

Thus, from the medical evidence, it is clear that the deceased died an unnatural homicidal death.

4. Learned APP Mr.Bukhari submitted that the trial Court has erroneously rejected the evidence of the two eye witnesses namely, Ravjibhai, PW3-Exh.13 and Shivabhai, PW4-Exh.15 respectively, on untenable grounds. In the submission of learned APP, the incident had taken place in the morning hours, and especially when the accused are relatives of the deceased, they were known to the eye witnesses and therefore, there was no reason for the eye witnesses to falsely involve the accused. The prosecution witnesses, in the submission of Mr.Bukhari, learned APP, clearly involve the accused regarding their presence, their participation in the commission of the offence, supported with the recovery of the weapons with human blood, matching the blood group of the deceased. He, therefore, submitted that the prosecution has established the case against the accused beyond reasonable doubt and therefore, he requested that the appeal may be allowed.

Mr.M.J.Buddbhatti, learned Counsel appearing for the respondents accused supported the judgment of the trial Court in toto.

5. Ravjibhai, PW3-Exh.13, informant, in his evidence has deposed that he and his deceased father had gone to the field at about 7.30 a.m. According to him, his father had come to the field after about one hour when he was cutting grass in the field; and at about 10.00 a.m., they were returning from the field; the informant was

carrying a heap of grass on his head, and he was walking behind his father at a distance of about 25 ft. While they were walking so, his father fell down on the field and the informant heard the screams of his father. When he threw the grass from his head on the ground, he saw that all the accused were beating his father. Accused No.1 and Accused No.2 were hitting with Dharia and Tabbal on his father while Accused No.3 was standing with Spear in his hand. The wives, namely, Ambaben and Jadaben of Accused Nos.1 and 2, respectively, who were cutting the grass also saw the incident. According to this witness, all the accused thereafter went towards the village in their own cart. This witness has thereafter gone to his father. His wife, Santok and his brother Shiva, PW4 also came there. His father became unconscious and died then and there. After leaving his brother Shiva and his wife Santok there, this witness went to the village and inquired about Police Patel whom he met about 12.00 O'clock and informed him about the murder of his father and also gave him the name of the accused. Police Patel Amarsing accompanied him to lodge the complaint at village Police Station. When they reached near the Canal Road, they saw Accused Nos.1 and 2 there. This witness informed police Patel that these people would kill him. Therefore, they went to village Nondhana and from there, they got a bus bound for Jambusar. From there, they went to Vedach Police Station at about 3.00 p.m. and lodged the complaint and with the company of the Police, he returned to the scene of offence. According to this witness, for the purpose of watering the field, quarrel used to take place between the accused and the deceased. He has admitted that in a murder case having taken place in the year 1981, the deceased and his five brothers were accused who were charged for committing murder of two sons of present Accused No.1.

In the cross examination, this witness has admitted with regard to the murder of the two sons of the present Accused No.1 which was committed in the opposite field of the present scene of offence. He has also admitted that his brother Shiva was also one of the accused in that case. He has admitted that against the order of acquittal in that case, the appeal in the Gujarat High Court is pending. He has further admitted that after the incident of 1981, no untoward incident has taken place till the present incident. He has also admitted that he and his brother Shiva are residing separately from his deceased father. His father was staying with his other brothers even though they are staying in the same area. It is also admitted that they used to pass through the field of the accused even after

the incident of 1981 and they used to meet each other either during day time or during night time. He has stated that for the purpose of cutting grass, he was required to carry sickle with him. He has further stated that his father has not informed him about going to the field. He has come to know for the first time that his father had arrived at the field when he saw him in the field. He has also admitted that he was not aware about the arrival of his brother Shiva and wife Santok in the field. He has stated that when he had gone to the field on the day in question, the accused were there and also their wives were there cutting the grass. He has admitted that many persons were there in the field and were doing agricultural work. He has admitted that on hearing the screams of his father, though heard by many persons in the field, nobody had come. He has given the names of the persons who were doing agricultural work in the field. Regarding the incident, he has admitted that when he heard the screams of his father, his father had already fallen down on the ground and the Accused Nos.1 and 2 were beating him while Accused No.3 was standing. Both Accused Nos.1 and 2 have inflicted about 15 blows on his father and thereafter they had gone in their cart. According to him, he saw his brother Shiva and wife Santok near his father. He has further stated that after leaving his father, his brother Shiva and wife Santokm at the scene of offence, he had gone home and when he returned with police, they were there at that place. He has further stated that he has in fact informed Police Patel Amarsing that his brother Shiva and his wife Santok had also seen the incident. According to him, Police Patel had not taken down the information conveyed to him nor he has obtained his signature. He has admitted that he and Police Patel had left for Vedach on bicycle.

Shiva, PW4-Exh.15 is the brother of informant Ravji. He, in his evidence, has stated that Santok is the wife of informant Ravji. He and Santok had gone to the field on the day in question and had cut grass upto 10.00 O'clock. On hearing the screams of his father, they had gone to the field of one Chandu Punja and saw the incident sitting behind the fence of the field. According to him, Accused Nos.1 and 2 were inflicting blows with Dharia and Tabbal to his father and Accused No.3 was standing there with Spear in his hand. After beating his father, the accused had gone to their field and in a cart they had gone to the village. According to him, he saw his brother on the road. He also saw Ambaben and Jadaben, wife of Accused Nos.1 & 2 respectively in their field, cutting grass. After the incident, his brother had come from the road and met him and his Bhabhi

and reached the place where his deceased father was lying. His brother Ravji had examined his father and found him dead. He has also stated that he and his brother Ravji waited there for about 1/2 hour and thereafter his brother had gone to police Patel to inform him. In the cross examination, he has admitted that after the incident of murder which has taken place in the year 1981, no untoward incident had taken place between the accused and the deceased. He has further admitted that the accused and they are doing their agricultural operations in the fields situated adjacent to each other. Not only that, they are meeting each other in the area in which they are residing. He has admitted that after all the accused left in the cart after the incident, his brother Ravji had come to the place where his father was lying.

Police Patel Amarsing, PW5-Exh.16 in his evidence has deposed that Ravji had come to his house at about 12.00 O'Clock on the day in question and informed him that his father was killed by the accused. He, therefore, advised him to go to the Police Station. Both of them thereafter started for Vedach Police Station on bicycle. When they reached the Canal Road, Accused Nos. 1 and 2 were standing there and therefore, they returned to village Nondhana where they kept their bicycle at the place of a friend and went to the Bus Stop and went to Jambusar. Thereafter in a rickshaw, they went to village Police Station where the informant lodged the complaint. In his cross examination, he has admitted that he is aware about his duty as Police Patel. He has admitted that whatever information conveyed to him, he has stated so before the Police. He has admitted that for the purpose of recording information, a complaint book is provided to him where he has to mention about the offence and also to obtain signature of the informant. He has admitted that for reaching Vedach from village Samoj on bicycle, one may require 1-1/2 hour. he has admitted that for the purpose of reaching Vedach, besides Canal Road, there are other ways also and it is not necessary to go to Jambusar. He has admitted that he has not recorded the information given by the informant in the complaint book. He has admitted that he has not stated in his police statement that when they went on bicycle, they saw Accused Nos.1 and 2 at the Canal Road and that they had returned to village Nondhana and kept their bicycle at the place of his friend. He has also admitted that he has not stated that they have started for Vedach on bicycle. He has also admitted that he has not shown the bicycle to the police and also the house of his friend Vinodbhai. He has also admitted that he has not

stated in the police statement that they had gone to village Nondhana and as the accused met them on the way, they had gone to Jambusar in a bus. According to him, when they reached Vedach Police Station, Head Constable was present, however, he has not disclosed to him regarding the names of the accused and on the contrary, he has stated that Ravji had come and therefore, to accept his complaint. He has also admitted that the police had not recorded the said complaint and that the police had not even recorded the fact that he had gone in search of the informant. As per his evidence, they had waited at the Police Station for about 15-20 minutes and they were informed by the Police to wait till the vehicle comes and until that time, his statement was not recorded.

6. From the aforesaid evidence on record, it appears to us that the prosecution has not led reliable and trust worthy evidence. From their evidence, it further appears that they are not the reliable witnesses who have witnessed the incident and on the contrary, it appears to us that they are got up witnesses. In absence of any motive, there was no reason for the accused to commit the offence on the day in question especially when after the incident of murder of the two sons of Accused No.1 in 1981, no untoward incident had taken place between the parties and on the contrary even though they are residing in the same area and have their field adjacent to each other and in fact they were meeting each other, no quarrel worth name was taken place between them. Therefore, in absence of motive, the question arises as to why should the accused commit the offence on the day in question?

If at all the accused were to commit the murder of the deceased, normally, they would like to keep away their wives while committing the same In the instant case, as per the allegation of the prosecution, the accused have committed the murder in a place when their wives Ambaben and Jadaben were infact, busy in the agricultural operations. It has come in evidence that PW3 and PW4 are not residing with the deceased father. They were not aware about the timings of the arrival of their father at field. Likewise, the accused are also not aware about the timings of the arrival of the deceased. In such situations, it appears to be highly improbable regarding the presence of the accused with the deadly weapons in their hands in the field on the day in question. Even on the question of witnessing the incident, the evidence of informant Ravji and his brother Shiva and their subsequent conduct appear to be highly

improbable. Even though informant Ravji has stated that he was walking behind his father at a distance of 25 ft., and he saw his father falling down on the ground and Accused Nos.1 and 2 were giving blows while Accused No.3 standing with Spear in his hand, he does not state as to from which direction the accused came and how his father was assaulted. The statement of the informant, namely, that he saw the incident after hearing the screams of his father when he fell down is not acceptable and appears to be unnatural. The conduct on the part of the informant is quite unnatural in as much as even though his father is assaulted and being beaten mercilessly, he is not doing anything to save his father. Being unarmed, he may not intervene, but surely he would shout and would certainly try to call the persons working in the field. The informant, in the instant case, is not doing anything and is just standing there and allowing all the accused to go away after committing the heinous crime in a cart to the village. The conduct of the informant, thus, raises serious doubt regarding his presence at the time of the incident.

As per the say of the informant, after leaving his brother Shiva and wife Santok at the scene of offence, he had gone to the village to inform Police Patel and has also stated that they remained there till he returned with the police, which also does not appear to be possible. His brother Shiva and wife Santok were the eye witnesses and therefore, the informant will not miss this fact to be narrated in the complaint, however, the complaint is totally silent regarding the presence of these two persons at the time of the incident. This fact of the informant's silence with regard to their presence is not only clear from the complaint but also in his further statement recorded by the Investigating Officer.

Even though the incident has taken place at about 10.00 a.m., the complaint is filed at about 3.30 p.m. The prosecution has not explained this inordinate delay in the late filing of the complaint. As per the say of the informant, he met Police Patel Amarsing at 12.00 O'clock. Even though Police Patel maintained the complaint book and even though the cognizable offence is disclosed to him, the said fact has not been noted down in the complaint and therefore, the names of the accused are not disclosed at the first available point of time. The fact that Police Patel Amarsing accompanies the informant, on the contrary, goes to suggest that he takes undue interest in the matter and it is just with a view to help the informant. In view of the many contradictions in the statement of Police Patel Amarsing

regarding going to Vedach Police Station on bicycle and thereafter returning home and to leave the bicycle at the place of his friend are nothing but unsuccessful attempts on the part of the prosecution to explain the delay in filing the complaint. Therefore, a doubt certainly arises with regard to the involvement of the accused in commission of the offence in question. There was no reason for Accused Nos.1 and 2 to remain present at the Canal Road and equally there was also no justifiable reason for the informant and Police Patel Amarsing to return home after seeing both the accused there as it has come in evidence that there were more than one way to go to Vedach Police Station.

Likewise the evidence of Shiva, PW4, in our opinion also, is not reliable and trust worthy. He is also the son of the deceased, who witnessed the incident sitting behind the fence of the field of one Chandubhai. Even though he has witnessed the incident, like the informant, he also just keeps some watch without doing anything to save his father from the hands of the accused or to call the persons working in nearby fields. In his evidence, he has contradicted the evidence of the informant on the material fact. It is the say of the informant that he had gone to inform Police Patel after leaving his wife Santok and his brother Shiva near the dead body of his father, while Shiva in his evidence states that he and wife of the informant had come to the place where the deceased was lying after the informant left to inform Police Patel.

7. Reading the aforesaid evidence, it is clear that the evidence of the so-called eye witnesses is highly unnatural, improbable and therefore, not believable. They are surely got up and highly interested witnesses. The prosecution, in the instant case, could have brought on record the evidence of independent witnesses especially when many persons were working in the fields at the time of the incident. It is highly unnatural that even though deceased after receiving blows cried for help, which must have been heard by the persons working there and must have been witnessed the incident, no evidence of such witnesses has been brought on record. In absence of such evidence, it is not possible for us to convict the accused by relying upon the evidence of the so-called eye-witnesses who are, as stated above, highly interested witnesses. Once we hold their evidence as not believable, the recovery of muddamal weapons, i.e. Dharia, Tabbal and Spear with blood stains thereon having matching group of blood of the deceased, falls in insignificance.

8. Thus, taking the overall view of the matter, we are in total agreement with the reasoning and the ultimate conclusion recorded by the learned trial Judge in acquitting the respondents from the charge levelled against them.

9. In the result, we do not see any merit in this appeal and the same is dismissed. The bail bonds shall stand cancelled.

(Kshitij R. Vyas, J.)

(Kamal M. Mehta, J.)

Sreeram.